Breach of contract - claim by the plaintiff for damages.

[2012]JRC053

ROYAL COURT
(Samedi)

14 March 2012

Before : H. W, B. Page, Q.C., Commissioner, and Jurats Clapham and Nicolle.

Between	**Café de Lecq Limited**	**Plaintiff**
And	**R. A. Rossborough (Insurance Brokers) Limited**	**Defendant**

Advocate A. D. Robinson for the Plaintiff.

Advocate N. F. Journeaux for the Defendant.

JUDGMENT

THE COMMISSIONER:

Introduction

1. On 8th May, 2007, the Café de Lecq on the north coast of the Island burned down. The cause was overheating of cooking oil in a deep fat fryer. Over four and a half years on, the café has yet to be rebuilt.

2. Some two months previously, the café had been insured with AXA Insurance UK plc ("AXA") via the defendant, R. A. Rossborough (Insurance Brokers) Limited ("Rossborough"). The policy provided, among other things, for cover of £220,000 for buildings and business interruption of £500,000 for a period of twelve months.

3. Instructions for the insurance had been given to Rossborough by Mr. Michael Ruellan, who, together with his wife and Mr. Barry Reynolds, had agreed at around that time to buy the café and its business from the then owners, Mr and Mrs Ropert; or, to put it more accurately, had agreed to acquire the totality of the shareholding in the plaintiff company from the Roperts. Café de Lecq Limited was the Jersey registered company in which the legal ownership of the café and its business was vested both immediately before and after this transaction.

4. Café de Lecq was not the first venture in which Mr Ruellan and Mr Reynolds had been jointly engaged. They had known one another for many years and had been involved as business partners, usually on a 50/50 basis, with Mr Reynolds negotiating the acquisition of the business but thereafter taking the role of sleeping partner and leaving Mr Ruellan to run it. Nor was this the first occasion on which Mr Ruellan had used Rossborough as insurance brokers. At the time with which we are concerned Mr Ruellan and Mr Reynolds had, among other things, been partners in The Breakwater Café in St. Catherine's for some time; in February 2006, Mr Ruellan had arranged insurance for that business with Insurance Corporation of the Channel Islands Limited ("ICCI") through Rossborough; and that policy had just been renewed in early February 2007.

5. On or about 20th July, 2007, following enquiries into the circumstances of the fire, AXA gave notice declining payment of any kind under the policy on the ground that liability had been expressly stated in the policy documentation to be conditional on any deep fat fryer at the café being fitted with a thermostat designed to prevent the temperature of cooking oils or fats rising above 230° centigrade and an automatic cut-out which would cut off the heat source power and extraction system in the event of failure of the thermostat, but the fryer in question was not one that incorporated these safety devices. In the course of its investigations AXA also mentioned concerns about the location of any fire-blanket, the type of fire extinguisher in the café and whether the building was of "standard construction". In the end, however, its rejection of liability was confined to non-compliance with the policy term concerning the deep fat fryer.

6. It is common ground in these proceedings that the cause of the fire was over-heating of fat in the fryer; that the AXA policy contained a term of the kind relied on in the form of an express warranty ("the DFF warranty"); that the equipment in question did not comply with that warranty; and that AXA's rejection of liability was well founded.

7. The core question in the case is whether blame for the resulting uninsured loss sustained by the plaintiff is to

be laid at the door of Rossborough. The plaintiff's case in a nutshell is that none of the policy documentation supplied by Rossborough to Mr Ruellan contained, either in the documentation itself or in Rossborough's covering correspondence, any reference to a DFF warranty or, if it did, not in such a way as sufficiently to draw attention to it and to the serious consequences of failing to heed its terms; the result being, either way, that Mr Ruellan was left in ignorance of this provision and did not take the steps that he would otherwise have taken to ensure compliance with the warranty.

3. The plaintiff also contends that at the time when the levels of cover were being discussed Rossborough should have, but did not, explore with Mr Ruellan the appropriate figure to be placed on the building itself and the appropriate period of time for which business interruption cover should be arranged; and that if these matters had been the subject of proper discussion the building would have been insured for a far higher figure and business interruption cover would have been arranged for a period of three years rather than just one. The importance of these issues lies in the fact that the costs of reinstating the café, as currently proposed, are likely to be considerably in excess of the sum for which the original building was insured and the time that has elapsed since the fire means that the specified cover of twelve months for business interruption cover will, in practice, have proved far from adequate.

9. Rossborough, for its part, asserts that the documentation that it supplied did contain the express DFF warranty; that the warranty was sufficiently prominent for any reasonable person to note; that the documentation included clear instructions to the recipient to take care to read and understand the documentation; and that if Mr Ruellan failed to read what he was sent Rossborough cannot be held responsible. As far as levels of cover are concerned, Rossborough says that it is quite wrong to suggest that its representatives should have done more than they did.

10. Rossborough also contends, in any event:-

(i) that, irrespective of the breach of the absence of an automatic cut-out on the deep fat fryer, AXA would have been entitled to and would have declined liability on a number of other grounds;

(ii) that the terms of Rossborough's standard terms of business exonerate them from liability of the kind claimed; and

(iii) that the plaintiff's claim in these proceedings is flawed because the insured under the policy was named not as "Café de Lecq Limited" but as "Michael Ruellan t/a [trading as] Café de Lecq"; that it was to Mr Ruellan alone that Rossborough owed any duty of care; and that a Deed of Assignment dated 25th February, 2010, made between Mr Ruellan and the plaintiff ("the Assignment") is worthless as Mr Ruellan personally had suffered no loss and had nothing of value to assign.

Each of these defences is disputed by the plaintiff.

11. It will be apparent, therefore, that the case raises important questions as to the scope of an insurance broker's duty of care towards his client; the extent to which that duty may be affected by the circumstances of the particular client; whether in the present case Rossborough fell short of that standard in any of the respects which are the subject of the claim; and if it did so, whether and to what extent losses sustained by the plaintiff as a result of finding itself uninsured – or under-insured – are attributable to those shortcomings. In relation to a number of these issues we were assisted by the reports and oral evidence of two independent expert witnesses: Mr. Robin Wood who was called by the plaintiff and Mr Barry Hammond who was called by Rossborough – both men of considerable experience in their own, if somewhat different ways, in the industry.

Events subsequent to the fire

12. A number of subsequent events require mention by way of prelude to what follows. First of all the matter of ownership. On the day before the fire, Mr Ruellan had agreed to sell his interest in the café to a Mr David Laverick, having found it impracticable to run both the Breakwater Café and the Café de Lecq. Mr Ruellan told the Court that in the immediate wake of the fire Mr Laverick had, somewhat surprisingly, still been ready to honour this deal. But, although the precise sequence of events and circumstances were not explored in evidence, it seems that at some point both Mr Ruellan and Mr Laverick dropped out of the picture completely leaving Mr Reynolds as the sole shareholder in the plaintiff company and the individual primarily concerned with the future of the café site.

13. Secondly, the involvement of Mr Nigel Sweeney, Mr Reynolds' brother-in-law. Shortly after the fire, Mr Reynolds brought in Mr Sweeney, a surveyor with the firm of NSJ Chartered Surveyors, to assist in negotiations with AXA and to set in progress plans for rebuilding the café.

14. Thirdly, progress towards rebuilding the café. On 19th June, 2007, Godel Architects of La Chasse Studio in St Mary ("Godel") were retained by Mr Sweeney on behalf of Café de Lecq Limited to draw up a design for a replacement building of substantially the same size with a target construction cost of £250,000 and to prepare applications for planning and bye-law consents. By November 2007 a scheme for rebuilding had been developed by Godel ("the Godel design"), and submitted to the Planning Department. A Planning Permit was granted, relatively quickly, on 1st February, 2008, and Building Bye-Law Regulation approval some nine months later on 19th November, 2008. In January 2009, a firm of builders, A.C.Mauger ("Mauger") completed a cost estimate for construction of a new building to the Godel Design with a total figure of £449,698.

15. On any view the proposed new building, if built according to the Godel design, would be architecturally different from the old one, with better facilities in some respects and to a higher specification of construction and finish. Some of this reflects a matter of choice and preference on the part of the plaintiff; but other features have been dictated or, at least, heavily influenced, by modern planning and bye-law requirements that did not exist at the time when the old café was built. In the context of the issue with which this Court is concerned, namely for what sum is it likely that the old café would have been insured had the matter of replacement costs been addressed more fully than it was in March 2007, difficult questions arise as to the extent to which these different elements contribute to the currently projected cost and as to what would have been reasonably foreseeable back in March 2007.

16. Whether or not the proposed rebuilding actually goes ahead is, however, dependent on whether the plaintiff is able to secure an extension to its current lease of the site from the States or a new lease. We were told by Mr Reynolds that negotiations on the subject had been going on for some time; that a new 25 year lease has been agreed, but not the detailed terms; that the States will not finalise the terms until it knows exactly when the café will be rebuilt; but that it is impossible for him to answer that question until the outcome of the current litigation is known as the project cannot be funded unless and until compensation for the plaintiff's uninsured loss is recovered from Rossborough. Hence, says the plaintiff, the state of affairs in which the site still remains derelict.

March 2007: The insurance documentation

17. The communications between Mr Ruellan and Rossborough, concerning the placing of the Café de Lecq insurance fall within a very small compass of time in February and March 2007. The sequence of events, itself, is uncontroversial.

18. On 27th February, 2007, Mr Ruellan telephoned Rossborough to ask for a quotation. The call was taken by Mr Nigel Lee-Briard, a commercial business account handler of some six years' standing and a director since early 2006 or thereabouts.

19. The task of obtaining quotations in the market was given to Mr Richard English, a more junior member of Mr Lee-Briard's team. Having obtained four quotations, Mr English telephoned Mr Ruellan on the afternoon of 1st March, 2007, informed him that AXA had quoted a premium of £850 and established that Mr Ruellan was happy with this. The question of when insurers were to go on risk was left over for Mr Ruellan to inform Rossborough in due course, the intention being that he would do this when possession of the café was about to be taken.

20. The following day, 2nd March, 2007, Mr English wrote to Mr Ruellan as follows:-

> *"Thank you for contacting us for quotation in respect of the above. Having discussed your individual requirements I am pleased to confirm our quotation as follows:-*
>
> *Café*
>
> | | |
> |---|---|
> | *Buildings Sum Insured* | *£220,000* |
> | *Contents Sum Insured* | *£ 20,000* |
> | *Stock Sum Insured* | *£ 1,500* |
> | *Deterioration of Stock* | *£ 2,000* |
> | *Public Liability* | *£2,000,000* |
> | *Products Liability* | *£2,000,000* |
> | *Employers Liability* | *£10,000,000* |
> | *PREMIUM* | *£850.00* |

A Statement of Fact is enclosed which confirms the information you have given to us and forms the basis of any quotation given. If anything is incorrect or needs changing then you should contact us at once as it may affect the quotation given, however if the Statement of Fact is correct then please sign and return [the] form to us at your earliest convenience".

It is common ground that a statement of fact accompanied this letter but disputed whether the AXA Quotation itself was enclosed.

21. On 15th March, 2007, Mr Ruellan telephoned Rossborough and spoke to Mr English, telling him that the statement of fact needed correction in one respect (that the premises were in fact protected by a Securicor intruder alarm system) and that occupation of the premises had taken place that day and cover should, accordingly, be put in place.

22. Having relayed this information to AXA, Mr English sent a letter to Mr Ruellan, the same day, 15th March, in the following terms:-

"Policy No.HB PUB 1857176 – Café De Lecq

I have pleasure in enclosing your new policy documents, statement of fact, certificate of employers liability and our company invoice for the new business premium of £850.00 following inception of the above policy.

Please read it carefully to ensure that it is correct and meets with your requirements and I look forward to receiving your remittance and signed statement of fact as soon as possible.

If you have any questions regarding the policy or if any alterations are required, then please do not hesitate to contact us."

23. It is convenient to deal first with the question of what documentation actually accompanied Mr English's letters to Mr Ruellan of 2nd and 15th March, 2007. In the case of the former, the point in dispute is whether, in addition to the statement of fact expressly mentioned in the letter (which undoubtedly was received by Mr Ruellan), the enclosures also included an eight-page AXA document headed "Pubs & Restaurants – Quotation" in the form of a six-page letter addressed to Mr Ruellan and a two-page appendixof which no specific mention was made in Mr English's covering letter.

24. In the case of Mr English's letter dated 15th March, 2007, it is common ground that the documents enclosed included:-

(i) those specifically referred to in the letter: a statement of fact (amended from the previous version as regards the existence of an intruder alarm), a certificate of employers' liability, and an invoice from Rossborough;

(ii) (in all probability) a two-page summary of the insurance cover, prepared by Rossborough, dated 15th March, 2007;

(iii) a sixty-four-page AXA booklet entitled *"RESTAURANTS, WINE BARS AND PUBLIC HOUSES – Your Policy Terms and Conditions, June 2005";*

(iv) a document in the form of a short letter dated 15th March, 2007, from AXA addressed to Mr Ruellan referring to "enclosed" but otherwise unspecified documents;

(v) the first five pages of a seven-page AXA document headed "Pubs & Restaurants – Policy Schedule" (the fifth page of which consisted of a copy of the employers' liability certificate already mentioned).

What is in dispute is whether the final two pages (*"Page 6 of 7"* and *"Page 7 of 7"*) of this last document were also included or were missing and were never received by Mr Ruellan.

25. The materiality of the two key enclosures – the AXA Quotation in the case of the 2nd March letter and the AXA Policy Schedule in the case of the 15th March letter - lies in the fact that each included:-

(i) a section headed "Endorsements Applicable to Your Policy" the second item of which included the words "DEEP FAT FRYING WARRANTY" [repeated] followed (in smaller type face) by *"Please see Appendix for full wording",* and

(ii) an appendix (in identical wording in each case) the second part of which included, under the heading "Premise 1 – Deep Fat Frying Warranty", nine numbered items prefaced by the words "It is warranted that ….".

It is unnecessary to set out the full terms of the warranty; but they included clearly intelligible provisions concerning, among other things, the fitting of all deep fat frying equipment with a thermostat and an automatic cut-out, as specified, and a fire blanket and fire extinguisher, also as specified.

26. The plaintiff alleges that the AXA Quotation was not among the documents accompanying Mr English's letter of 2nd March, 2007, and, as no mention of the document was made anywhere in the letter, Mr Ruellan had no reason to think that anything had been omitted and was accordingly wholly unaware of the DFF warranty. As regards the 15th March, 2007, letter, the plaintiff says that the contents of Mr English's letter contained nothing to alert him to the fact that the appendix to the policy schedule was missing, or to draw his attention to the endorsement on the third page of the policy schedule and the grave consequences of non-compliance; without more, it was unreasonable to expect him to have picked up the reference to the endorsement and the missing appendix; he, accordingly continued to be oblivious of the fact that the policy contained this important term.

27. The two Rossborough letters in question were, by any standards, poorly drafted in that they failed to list precisely and comprehensively, either in the body of the letter or by way of footnote, the documents said to be enclosed: the same goes for the AXA letter of 15th March, 2007, which was passed on by Mr English with his letter of that date. That said, having seen and heard the totality of the evidence on this aspect of the case, we find that the probability is that the statement of fact enclosed with Mr English's letter of 2nd March, 2007, was accompanied by the AXA quotation and that there were no pages missing from the AXA policy schedule enclosed with his letter of 15th March, 2007. Unsurprisingly, neither Mr English nor Mr Lee-Briard could say with unqualified certainty that he recalled enclosing the disputed documents in this particular case, given the number of broking transactions that they handle. But both insisted that it would have been their normal practice to have done so and it is evident that the purpose of Mr Lee-Briard adding his signature to the letters, as he did, was to reduce the risk of slip-ups of the kind that the plaintiff suggests occurred on these two occasions. Absent any persuasive evidence to support a contrary conclusion there is no reason to suppose that the usual practice would not have been followed in the present case. As it was, we found the plaintiff's own evidence on the point far from compelling.

28. In the first place, it consisted of little more than Mr Ruellan's own evidence that he had no recollection of ever seeing the documents in question prior to the fire. This may well be true, but having seen and heard him in the witness box, we find it difficult to have much faith in the suggestion that this necessarily means that these parts of the documents were in fact missing.

29. Secondly, the plaintiff was unable to produce Mr Ruellan's original file of correspondence with Rossborough. It is necessary at this point to return to 8th May, 2007. The combined evidence of Mr Ruellan and Mr Reynolds was to this effect:-

(i) Having received a telephone call to say that the café was on fire, Mr Ruellan drove to Greve de Lecq. There, among others, he met Mr Lee-Briard (the first time that the two had met) and was handed a sealed envelope which Mr Lee-Briard informed him contained a copy of the café's insurance policy. Mr Ruellan did not open it but passed it on to Mr Reynolds who had also, at some point, arrived at the site.

(ii) Only when he got home, later in the day, did Mr Reynolds open the envelope. According to him, when he did, the first thing he saw on top of the papers was the DFF warranty. Whether the warranty was in fact on top, which would not have been the natural place for it to be, was never convincingly resolved one way or the other but is almost certainly a red herring. The important point is that one way or another Mr Reynolds quickly spotted the warranty and had no difficulty in appreciating its relevance. His response to Mr Journeaux's suggestion that he would have understood that it was a condition of the insurance that the deep fat fryer was equipped with the safety features described was "you have got to be mental not to understand that" and that he did not, he said, need an insurance broker to explain that.

(iii) Mr Reynolds then telephoned Mr Ruellan and he in turn went to the Breakwater Café to search for his file of correspondence with Rossborough: he evidently expected to find it in the former war-time bunker adjacent to the café which he used as a storage facility. Mr Ruellan described how, in the dimly lit bunker (which had no electricity supply), he carried out a frantic search, found his insurance file but not the relevant documentation. His account of what he did find in that file was, however, anything but clear. Nor was it clear what happened when Mr Reynolds, Mr Ruellan and Mr Laverick met the following day, as they did, or what became of the file that Mr Ruellan says he did find. There was some suggestion in the course of Mr Reynolds' evidence that Mr Laverick took it, but this was left unexplored.

30. We find therefore that Mr Ruellan did in fact receive documentation that included reference to and the text of the DFF warranty under cover of Rossborough's letters of 2nd and 15th March, 2007.

Whether notice of the DFF warranty and of the consequences of non-compliance were sufficiently drawn to the plaintiff's attention by Rossborough

31. The insurance broking industry in Jersey is now regulated by The Codes of Practice for General Insurance Mediation Business issued by the Jersey Financial Services Commission in accordance with powers conferred by Article 19 of the Financial Services (Jersey) Law 1998. Although these Codes did not take effect until 1st January, 2008, and have been revised subsequently it was agreed by both experts that their provisions reflect insurance market practice prevailing at the time when the Café de Lecq policy was effected, at least as regards the requirements that a broker ("a registered person") must have due regard for the interests of its customers; must act with due skill, care and diligence; and, where a broker is responsible for providing advice or exercising discretion "must be able to demonstrate that it has provided the best advice or exercised the necessary discretion that is appropriate for its customer's needs" (section 2 at 2.1 and 2.2). Although section 2.2 speaks of "best practice", the present case was conducted on the basis that the requisite standard of skill and care was, as in England, that reasonably to be expected of the average competent and careful broker: Dixon & Ors-v-Jefferson Seal Limited [1997] JLR 205 per Hamon, Deputy Bailiff at 209 (a claim against stockbrokers) and the English authorities there cited. Codes of practice governing brokers in England may, accordingly, reasonably be taken as also affording useful guidance in the present case. The standard must, moreover, "be based on events as they occur, in prospect and not in retrospect" Duchess of Argyll-v-Beuselink[1972] 2 Lloyd's Rep 172 per Megarry J at 185.

32. It was also common ground that what this standard means in practice will vary from case to case according to the particular circumstances in question, but that, on any view, such circumstances will include, first, any instructions received from the client and, secondly, the extent to which the client appears to be experienced as regards insurance in the area in question: see, for example, the decision of the Privy Council in Pickersgill & Le Cornu-v-Riley [2004] JLR 102, per Lord Scott of Foscote at paragraph 6, a case involving a claim against a solicitor, but which both counsel in the present case accepted as equally applicable to an insurance broker.

33. What was disputed, among other things, was the view that Rossborough should have formed as to Mr Ruellan's experience of insurance matters. Rossborough argued that he was by no means inexperienced and that it was entitled to proceed accordingly in its dealings with him. The plaintiff says not so: he had no such particular expertise or experience and there was no justification for treating him otherwise. There is no doubt that, at the time in question, Mr Ruellan was a businessman of considerable experience and success in the management of restaurants, cafés and other catering or entertainment establishments, and in that capacity had from time to time been involved in obtaining requisite insurance, as indeed he would have done in relation to domestic matters such as property and cars. But there must be a great many small business people and others to whom this would apply, and to treat such circumstances as classifying them as "experienced" in the sort of context with which we are concerned is, in our view, to set the bar too low. Insurance is a subject notoriously replete with technical terminology and principles of which the average layman has no more than a rudimentary grasp.

34. In any event, there appeared to be nothing that would have justified the persons at Rossborough who dealt with Mr Ruellan concluding or assuming that Mr Ruellan had above-average experience of insurance. He had previously placed insurance through them in connection with the Breakwater Café (mentioned earlier). But beyond that, they knew little if anything about him. Mr Lowery, who dealt with Mr Ruellan in relation to the Breakwater Café accepted that he had no idea about Mr Ruellan's experience with that kind of policy; nor did Mr English, who was given the job of obtaining quotations from underwriters for Café de Lecq and only had one short conversation with Mr Ruellan. Mr Lee-Briard initially asserted in evidence that Mr Ruellan was not an ordinary member of the public who needed advice, but acknowledged in cross-examination that this was not based on anything other than the fact that Mr Ruellan was already a client of the firm in connection with insurance of the Breakwater Café. Certainly there was nothing in any Rossborough file note touching on the matter of Mr Ruellan's experience or otherwise.

35. Any reader studying the terms of the deep fat fryer warranty at page 7 of the AXA quotation of 2nd March, 2007, or the AXA policy schedule of 15th March, 2007, would have had no difficulty in understanding what was being "warranted" so far as the equipment in question was concerned and that this was a requirement of some significance. Mr Reynolds' account of his reaction when he first set eyes on the warranty after he got home on 8th May, 2007, is not without relevance here, but was no doubt prompted very largely by the fact that this was in the immediate wake of the fire and his understanding (already) that its cause was likely to have been overheating of the deep fat fryer. The question is whether at the material time, Mr Ruellan ever got as far as taking note of the existence and terms of the warranty and fully understanding its implications and whether it was reasonable for Rossborough to have expected him to do so.

36. There is no suggestion on the part of Rossborough that anything was said orally by any of those who dealt with Mr Ruellan to draw his attention to the existence of the deep fat fryer warranty or by way of explanation of its effect. Rossborough's case depends entirely on the documents supplied, which, they say, were perfectly sufficient to alert Mr Ruellan. It is accepted by the plaintiff that there is no reason in principle why such matters cannot be done entirely in writing: the problem, it contends, is that in the present case the documentation failed to do this.

37. Turning then to the documents themselves, the facts, so far as potentially relevant to this particular issue are as follows:-

(i) Mr Lowery's letter of 16th February, 2006, to Mr Ruellan confirming cover for the Breakwater Café with ICCI included a paragraph reading "I also enclose a copy of the warranties applicable to the policy and

request that you familiarise yourself with these as they are fundamental to the cover provided". However, when it came to renewal of that insurance a year later Mr Lee-Briard's letter of 5th February, 2007, while asking Mr Ruellan "to check the details shown on the attached schedule of cover to ensure that they remain in accordance with your requirements", did not include any specific reference to warranties and their importance.

(ii) Mr English's covering letter of 2nd March, 2007, to Mr Ruellan with a quotation for Café de Lecq drew attention to the accompanying statement of fact and the importance of ensuring its accuracy, but said nothing about the deep fat fryer warranty or warranties generally.

(iii) At page 5 of the accompanying AXA quotation, a brief reference is found, under the heading "ENDORSEMENT", to the existence of a deep fat fryer warranty the terms of which will be found (it is said in small print) in a later appendix.

(iv) It is not until the reader gets to pages 7 and 8 of the AXA quotation that one finds the appendix and, as the second item there, the actual text of the warranty.

(v) When it comes to Mr English's letter of 15th March, 2007, this too asked Mr Ruellan to read the policy documentation carefully "to ensure that it is correct and meets with your requirements" but made no reference to any warranty.

(vi) The only reference to warranties in Rossborough's two-page summary of cover was in a passage in upper case at the end recommending the the insured to read "THE ACTUAL POLICY DOCUMENT" "AT LEAST ONCE A YEAR TO ENSURE THAT YOU REMAIN FAMILIAR WITH ITS TERMS, CONDITIONS AND WARRANTIES".

(vii) The accompanying letter from AXA addressed to Mr Ruellan simply said "If you have any queries regarding these documents please either telephone AXA Insurance on the number detailed above or return it to the address shown above".

(viii) The AXA policy schedule more or less replicated the relevant provisions of the earlier quotation, except that the "ENDORSEMENT" appeared at page 3 and the appendix at pages 6 and 7.

(ix) The accompanying 64-page AXA Policy Terms and Conditions booklet contains no explanation or definition of the term "WARRANTY"; and it is not until page 58 in the small print under the heading "General Conditions of the Policy" that one finds this: "Policy Terms – It is a condition precedent to any liability on the part of the Company under this policy that the terms hereof so far as they relate to anything to be done or complied with by the insured are duly and faithfully observed and fulfilled by the insured and by any other person who may be entitled to be indemnified under this policy"

38. As regards Mr Ruellan's insistence that even if he did receive the complete set of policy documentation accompanying Rossborough's letters of 2nd and 15th March, 2007, without any missing pages, he was unaware that it included a "warranty" concerning deep fat fryers, we find his evidence plausible. It would not, we think, have been in character of the man, as he appeared to us, to have trawled carefully through the entirety of the documentation unaided. He was the first to admit that attention to detail was not his strong point. The crucial text was, if not quite "buried" among other provisions of the policy, far from immediately apparent. Rossborough had not mentioned anything about it on the telephone; their covering letters made no mention of it; nor did AXA's letter of 15th March, 2007. And to attempt to fix Mr Ruellan with knowledge of it by reason of the one mention of "warranties" in a letter from Rossborough over twelve months previously in relation to a different policy covering a different business is unrealistic.

39. As to whether Rossborough should have done more to draw Mr Ruellan's attention to the deep fat fryer warranty and to explain its implications, Mr Wood was in no doubt that a competent broker would and should have done this. Leaving a client to find it for himself in the policy quotation, schedule or full wording is not good enough: it is well known in the insurance industry (and we can well believe) that lay people for the most part do not read the detail of insurance. As he rightly emphasised, the term "warranty" in an insurance context does not connote a benefit to the insured (as in the case of the supply of goods such as motor car, camera or many household goods) but an onerous obligation and an important restriction on cover. An obligation, moreover, which must be strictly complied with throughout the period of the insurance (not just at the outset), the breach of which entitles an insurer not just to repudiate a claim but also to avoid the policy altogether and may even result in rejection or avoidance even if the breach has nothing to do with the claim.

40. Mr Hammond agreed that a warranty is important and represents a restriction on the scope of cover, but considered it unnecessary for a broker to draw attention to its existence and terms if these are clear from the policy documentation itself. But this opinion was based on the incorrect (as we have found) premise that there were good grounds for Rossborough treating Mr Ruellan as someone reasonably sophisticated as regards insurance matters; and he acknowledged that even if the existence of a warranty is clear from the terms of the policy, it takes more than that to bring home to an insured the full implications of such a term. We found Mr Woods' evidence on the matter the more logical and persuasive.

41. Nor did the evidence of Rossborough's own witnesses do much to support this aspect of their case. Mr English accepted that it is vital that the existence of such a warranty be made known to the client but effectively

acknowledged that nothing had been done other than to ask Mr Ruellan to check the documents supplied and nothing at all to draw attention to the consequences of non-compliance. In the course of his evidence it emerged, moreover, that it is now standard practice for Rossborough's letters to clients to draw specific attention to any warranties or endorsements, but he could not say when exactly this change of practice had been introduced.

12. Mr Lee-Briard, for his part, defended the way in which Rossborough had handled the matter but solely on the basis of the unwarranted (as we find) assumption that Mr Ruellan was someone who did not need advice or explanation: although his letters by themselves were, he accepted, insufficient to have made Mr Ruellan aware of the warranty, the accompanying policy documents – he argued – would have done so. However, he readily accepted in cross-examination by Advocate Robinson that, had he been dealing with someone he believed to be unsophisticated in insurance matters, he would have dealt with them differently and drawn attention to the deep fat fryer warranty as a significant restriction on cover and to the consequences of non-compliance.

13. Asked about the change of practice to which Mr English had referred, Mr Lee-Briard said that it had been made, not particularly because of the present claim, but because Rossborough reviews practice from time to time and the directors had decided to make this change. However, an e-mail from Mr Steve Wrigglesworth, Chairman of Rossborough replying to questions evidently posed by his company's professional indemnity insurers in mid-August 2007 following the fire at Café de Lecq included the following:-

> *"1…….With the latest Quotation and Statement of fact technology which were designed to achieve contract certainty, it is probably sufficient to rely on the quotation documentation although it would be more prudent to draw attention to specific Warranties in the covering letter."*

Advocate Journeaux invited the Court to dismiss this and the subsequent change in practice as nothing more than an understandable precaution in the light of events. But in the absence of any example of current wording or discovery from Rossborough concerning the change (other than the e-mail already mentioned, which was disclosed inadvertently and was the subject of an earlier ruling by the learned Bailiff) or any evidence from Mr Wrigglesworth (who, as we understand it, was present in Court for much of the trial), Mr Robinson not unreasonably suggested that the new practice represents to some extent at least an acknowledgment of inadequacy of the old one.

14. The process by which the insurance documentation in the present case was generated is also of relevance to this part of the case (as well as other aspects to which we come shortly). The matter was touched on briefly in Mr Hammond's original report and Mr Lee-Briard's main witness statement, but its significance only emerged fully during the course of the trial. It seems that it has for some years become increasingly common for insurers to enter into arrangements under which their software is installed on brokers' computers enabling the latter to offer quotations to clients on behalf of, but without further reference to, insurers ("a quote engine" as it was described). AXA and Rossborough had such an arrangement and it was this system that was used by Mr English to generate the quotation offered to Mr Ruellan for the Café de Lecq (although there was, as it happened, a technical hitch which prevented him printing out the forms and he had to ask AXA to e-mail them to him).

15. The practice is driven by considerations of speed and economy and is commonly employed in circumstances where 'package' policies are thought to be appropriate. It may well be that when it works properly it has advantages for all concerned, including the client-insured. But the present case illustrates all too clearly that the process – at least as operated by Rossborough in 2007 - can also entail significant risks of a quotation failing to meet the insured's needs or to reflect the true basis of cover.

16. The process depends on the broker populating the software programme with figures for the level of cover required and information supposedly supplied by the client and incorporated in a statement of fact. But the existence of "default" settings can mean that, if matters are not discussed fully with the client, facts or figures are generated and incorporated in the policy which are either arbitrary or are nothing more than assumptions. In the present case, for example, the fact that the period of cover for Business Interruption was only 12 months was almost certainly the result of a default setting (as to which see further below). The same apples to the answer "Yes" against the "Standard Construction" in the section of the AXA statement of fact form dealing with premises (see, again, further below). Mr English conceded that to a large extent he had populated the computer programme in the present case with information that he had not specifically discussed with Mr Ruellan, with the result that his letter to Mr Ruellan was factually incorrect in saying "A Statement of Fact is enclosed which confirms the information you have given to us", as was the heading in the AXA form "What You Have Told Us" (although the ensuing small print in that form did refer to "the latest information you have either provided us or has been assumed").

17. Mr Woods' description of this kind of system as laying the ground for "the next big mis-selling scandal" may have been a little melodramatic, but on any view it has the potential to cause trouble. Not just because of the risk of errors of one kind or another but, more fundamentally, because the process is designed to minimise the time and effort that the broker has to spend on the matter and to transfer responsibility for getting things right to the client, thereby draining the broker's role of much of its *raison d'être*. Also because it is liable to foster a situation in which the broker becomes more closely allied with the insurer whose policy documentation he is generating than is healthy, to the detriment of the client whose interest he is supposed to be looking after. If this last observation seems too harsh a judgment, the circumstances of the present case suggest otherwise.

Among the quotations obtained by Mr English following Mr Ruellan's initial approach to Rossborough on 28th February, 2007, was one from ICCI for a premium of £532 79 (said to be on the assumption that there would be deep fat frying). Having approached AXA for a quote and passed them this figure Mr English received the following reply: "That's a very good quote mate! Too good in fact. Our minimum premium for this type of policy is £850; I don't mind dropping the premium to that amount, but don't know if that's too far away from the ICCI quote…" Quite why, against this background, Mr Ruellan was only offered the AXA option - especially when Rossborough had so recently renewed cover with ICCI for the Breakwater Café and in doing so had informed Mr Ruellan in a letter dated 5th February, 2007, that the existing policy "remained competitively placed in the current marketplace" – was a question that plainly called for an answer. Mr Lee-Briard initially sought to explain matters by reference to various features of the AXA policy and its credit-rating but without, it seemed to us, much conviction, and in due course it became clear that the choice was in fact largely determined by the ease and speed of completing the business and minimising the time required to be spent with the client; also, in all likelihood, by the fact that commission rates paid by AXA were better than most.

48. It is important to remember that what we are concerned with here is not the fairness or efficacy of the contract between insured and insurer, but the relationship between broker and client: a relationship of agency, the sole purpose of which is actively to help the client secure a contract of insurance on terms that will serve his needs. That this cannot be done without the cooperation of the client is, of course, true; but the whole premise of the relationship is that it should accomplish something over and above what the client could do for himself were he to approach an insurer direct.

49. The deep fat fryer warranty represented, on any view, what those involved in the insurance world would recognise as a significant restriction on cover. Both experts were agreed, as was Mr Lee-Briard, that such a restriction is something that needs to be made known to the client. The relevant codes of practice emphasise this and the point is clearly reflected in Harvest Trucking C. Ltd-v-Davis [1991] 2 Lloyd's Rep 638 per Judge Diamond QC (sitting as a High Court Judge) at 643:-

> ***"If the only insurance which the intermediary is able to obtain contains unusual, limiting or exempting provisions which, if they are not brought to the attention of the assured, may result in the policy not conforming to the client's reasonable and known requirements, the duty falling on the agent, namely, to exercise reasonable care in the duties which he has undertaken, may in those circumstances entail that the intermediary should bring the existence of the limiting or exempting provisions to the express notice of the client, discuss the nature of the problem with him and take reasonable steps either to obtain alternative insurance, if any is available, or alternatively to advise the client as to the best way of acting so that his business procedures conform to any requirements laid down by the policy".***

50. Observations to similar effect can be found in the judgment of Phillips J in Youel-v-Bland Welch (the "Superhulls Cover" case) No.2 [1990] 2 Lloyd's Rep.431; also most recently in the judgment of Steel J in Nicholas G Jones-v-Environcom Limited & Anor [2010] EWHC 759 (Comm), [2010] Lloyd's Rep/ IR 676 (at para. 63):-

> ***"...I am not persuaded that it is sufficient to rely upon written standard form explanations and warnings annexed to proposals or policy documents. I understood the experts to be agreed on this. The broker must satisfy himself that the position is in fact understood by his client and this will usually require a specific oral or written exchange on the topic, both at the time of the original placement and at renewal..."***

51. What happened here, in short, was that Mr Ruellan sought insurance for the café premises and business through Rossborough; in the AXA statement of fact the answer "Yes" was entered against "Deep fat frying"; no other inquiry was made of Mr Ruellan about the specification, age or condition of the fryer that he would be taking over; Rossborough came back with a single quotation that contained a crucially important restriction on the cover that insurers were prepared to offer which was far from immediately evident; and that quotation was passed on to Mr Ruellan without Rossborough doing anything whatsoever, either in writing or orally, to draw Mr Ruellan's attention to it. In effect he was simply told "Here is the policy documentation: be sure to read it and check that it meets your requirements". Irrespective of Mr Ruellan's experience in insurance matters, this was not good enough.

52. It is not for this Court to be prescriptive as to how exactly a broker should word his correspondence with clients in order to draw attention to the existence of significant warranties or endorsements and to emphasise the implications of non-compliance. But the substance of the message that needed one way or another to be got across in the present case was simple: that AXA were only prepared to offer cover on terms that the deep-fat fryer complied (and would continue to comply throughout the term of the insurance) with the specification set out in the appendix to the accompanying schedule and that any failure to comply with that specification would be likely to render the whole policy ineffective. It was a message that needed to be prominently stated in Rossborough's covering letter, which in the ordinary way would be the very first document that the client would

see on opening the envelope. For present purposes what matters is that Rossborough came nowhere near doing this.

53. We have no hesitation, therefore, in concluding that, in failing in their letters or otherwise to draw the terms of the DFF warranty and the consequences of non-compliance with it to Mr Ruellan's attention, Rossborough fell short of what was reasonably to be expected of it and must be counted in breach of its legal duty of care. We also find that it is more likely than not that, had these matters been clearly emphasised, Mr Ruellan would have taken steps to ensure that the Café de Lecq deep fat fryer complied with the terms of the warranty, probably by investing in a new one at a cost of no more than £1,000 or so.

Other grounds on which AXA might have declined to pay?

54. The plaintiff's claim in this case is essentially one for damages for loss of opportunity to recover money contractually payable by a third party, in other words to recover under the AXA policy of indemnity. As a matter of law this means that the plaintiff must demonstrate, as a matter of causation, that on a balance of probabilities there was a real or substantial chance, as opposed to a fanciful or speculative one, that but for the non-compliance of the deep fat fryer AXA would have accepted the plaintiff's claim: Allied Maples Group-v-Simmons & Simmons [1995] 1WLR 1602, CA. The plaintiff submits that there is no reason to suppose that this would not have happened.

55. Rossborough, however, contends that irrespective of the deficiency of the deep fat fryer, AXA would in any event have declined to meet any claim because the plaintiff, Café de Lecq Limited, was not named as the insured under the policy and Mr Ruellan had made a material misrepresentation as to who was carrying on the business, namely he himself rather than the plaintiff; because there was, it was suggested, no fire blanket readily to hand and the fire extinguisher in the kitchen was not of the requisite specification; and because the premises had been described in the statement of fact as being of "standard construction" when, it was alleged, this was not the case.

56. The course of events over the weeks immediately following the fire, so far as material, was as follows:-

(i) On 17th May, 2007, in the course of a telephone conversation between Mr Lee-Briard and Mr Richard Headington of Channel Island Adjusters (acting for AXA), Mr Headington spoke of a conversation that he had had "with Barry Reynolds who is apparently a 50% shareholder, Mick Ruellan is a 25% shareholder and Mick Ruellan's wife is also a 25% shareholder" (Mr. Lee-Briard's file note of 17th May, 2007).

(ii) As at 21st June, 2007, some six weeks after the fire, Mr Graeme Drysdale, AXA's Senior Large Claims Technician wrote (by e-mail) to Mr Lee-Briard informing him that AXA were minded to decline liability on three grounds: absence of an automatic cut-out on the deep fat fryer, lack of a fire blanket, and use of a CO2 fire extinguisher rather than a Class F wet chemical fire extinguisher as specified in the warranty. He added that he was still investigating concerns that the premises might not have been of standard construction.

(iii) On 3rd July, 2007, Mr Nigel Sweeney wrote to Mr Lee-Briard enclosing a copy of a letter from Mr Ruellan confirming that Mr Sweeney was authorised to act "on behalf of me, Café de Lecq Limited and Arthurs Yard Limited" in relation to insurance matters (signed by Mr Ruellan as "Director, Arthurs Yard Limited, Café de Lecq Limited").

(iv) On 6th July, 2007, Mr Lee-Briard replied to Mr Sweeney asking for confirmation of "the relationship between the various parties mentioned and our client/policyholder Mr M Ruellan t/a Café De Lecq"; and in response Mr Ruellan wrote on 10th July, 2007, as follows:-

> *"Further to your letter to Nigel Sweeney of 6th July, I write to clarify the position of ownership of the Café de Lecq. I am the Manager of the trading risk of Café de Lecq. The trading Company, Café de Lecq Ltd was purchased by my partner, Mr B G Reynolds and I, in March of this year. As I am the Manager of the trading risk, I only advised my name for insurance purposes as Mr Reynolds is a silent partner".*

(v) The same day, 10th July, 2007, Mr Reynolds visited Rossborough's offices and gave Mr Lee-Briard a copy of this letter. Mr Lee-Briard, for his part, read out Mr Drysdale's e-mail of 21st June, 2007, indicating AXA's intention to repudiate liability. Mr Reynolds insisted that the suggestion that there had been no fire blanket was incorrect.

(vi) On 18th July, 2007, Mr Drysdale wrote again telling Mr Lee-Briard that he had not completed his enquiries regarding the nature of the construction of the premises and whether it had been misrepresented. He said he was, however, satisfied that the deep fat fryer had not been fitted with "an automatic cut-out or over temperature thermostat" and his letter was accordingly to be taken as formal repudiation of the plaintiff's claim. That was the only matter relied on. There was no mention then, or subsequently, of the fire blanket or the extinguisher and there was no follow-up on the construction of the

building.

(vii) On 20th July, 2007, Mr Lee-Briard wrote to Mr Sweeney passing on the content of Mr Drysdale's message almost verbatim.

(viii) A subsequent request by Mr Sweeney for sight of the forensic and loss adjuster's reports obtained by AXA was refused by AXA on the ground that they were privileged.

57. Mr Robinson submits that it is plain that when it came to rejecting the plaintiff's claim, what mattered to insurers and what mattered alone was the absence of an automatic cut-out on the deep fat fryer and that, if that deficiency had not been present, the other potential concerns touched on by Mr Drysdale would not have led to repudiation by AXA of liability. Mr Journeaux suggests that it does not necessarily follow that AXA would not have declined liability on these other grounds but that appears to us to be purely speculative, very much against the odds and, in any event, unsupported by the kind of evidence that we would have expected to see if the point were going to be pursued seriously. Neither Mr Drysdale nor any other witness was called to say what AXA would have done; and in the absence of any such evidence and of the reports of the forensic expert and loss adjuster retained by AXA, there is no basis on which we could properly conclude that there was any significant chance that any of the points suggested by Rossborough would have justified AXA repudiating liability or would ever have been taken by them.

58. Moreover, as regards the point taken by Rossborough concerning the name of the insured in the policy, Mr Woods, in his report, had this to say:-

> *"It has been the tradition of the quality insurance market that where the true state of affairs would not have influenced the insurer's decision to insure, that the insurer would waive its rights to avoid (in other words that they would have issued exactly the same policy at the same rate but just in another name). In this case I express the opinion that if it did invoke its right to avoid, AXA would substantially be in breach of its duty to treat customers fairly".*

Mr Lee-Briard did not disagree. In any event, on the basis of Mr Headington's conversation with Mr Reynolds within days of the fire, it seems probable that by the time AXA came to repudiate liability they were well aware, but unconcerned, that Café de Lecq was owned by a company of some kind rather than by Mr Ruellan personally. There was nothing in evidence to suggest the contrary.

Should cover under the AXA policy have been higher than it was in certain respects?

59. The cover actually provided by the AXA policy was as follows: Buildings, £220,000; Loss of profit as a result of Business Interruption for a period of 12 months [agreed for the purposes of the litigation as £95,000]; Contents, £20,000; Stock, £1,500; Freezer contents, £2,000. A total of £338,500. The last three items are not in issue. But it is the plaintiff's case that, had Mr Ruellan been properly advised by Rossborough, the café building would have been insured for a substantially higher figure, possibly as much as £430,000; and the period of Business Interruption cover would have been at least three, or at least two, years.

The level of buildings cover

60. The question is whether Rossborough should have warned Mr Ruellan that buildings' cover of £220,000 might not be adequate and that he ought to take professional advice on the subject. It is common ground that what was required was a fair estimate of the cost of reinstatement in the event of its destruction (reinstatement value/cost). But there is no agreement and little evidence as to how the figure of £220,000 came to be used in the policy other than the recollections of the two participants to the telephone conversation on 27th February, 2007. Mr Ruellan said that, while he had understood that what Mr Lee-Briard wanted was an estimate of "re-build value", he gave him the figure of £220,000 simply because he believed that was the price that they (Mr Reynolds and he) were paying for the café business; that he told Mr Lee-Briard that this was what the figure represented adding that he could not be sure what the re-build value would be; that Mr Lee-Briard told him not to worry because the given figure could be used and adjusted later if necessary; that beyond that he was not asked any questions, given any advice or subsequently asked for any revised estimate. He (Mr Ruellan) added that he himself would not have known how to calculate the costs of reconstruction and, if pressed on the matter would probably have consulted Mr Reynolds. Mr Lee-Briard, for his part, said in his evidence in chief, re-affirmed in cross-examination:-

> *"I would have asked him [Mr Ruellan] for details of the cover he required. The figures I have noted on my manuscript note for buildings, stock, contents and DOS cover were all given to me by him in response to my enquiries as to the cover he required for those items. I do not recall him telling me that he had paid £220,000 for the business in total." (Emphasis added.)*

In cross-examination, while not resisting the proposition that most clients need advice on the subject, Mr

Lee-Briard could not recall what specific questions he had actually asked Mr Ruellan on the occasion in question. His contemporaneous manuscript attendance note of his telephone conversation with Mr Ruellan on 27th February, 2007, certainly does not record any advice or discussion on the point, consisting as it does of nothing more than "BUILDING £220,000"; and the repeated use of the phrase "*the cover he required*", without elaboration, in the passage from Mr Lee-Briard's witness statement reproduced above likewise suggests that no such discussion was prompted by him or occurred.

51. Mr Journeaux sought to make much of certain inconsistencies in Mr Ruellan's explanations of how it was that he came to think that the purchase price of the business was £220,000 when it was actually £205,000 and suggested that, in truth, the former figure was Mr Ruellan's own stab at reinstatement value/cost. But having seen and heard Mr Ruellan giving evidence we are inclined to think that the error was genuine and, on balance, to accept Mr Ruellan's recollection of his conversation with Mr Lee-Briard as the better of the two.

52. When it came to the evidence of the two independent experts, Mr Wood was in no doubt that it is a broker's job to make sure that a client understands what is meant by reinstatement value/cost, to explain the potential consequences of under-insuring, and if necessary to advise the client to get professional advice. Mr Hammond's view on the subject was more elusive but he accepted in cross-examination that it was more common than not for laymen to need help with the concept of reinstatement value.

53. We find, accordingly, that Rossborough failed to give Mr Ruellan, and thus the plaintiff, the advice and help that he was entitled to expect from a diligent broker on the subject of the appropriate level of buildings cover.

54. Evidence of what figure Mr Ruellan would have asked for the buildings to be insured had he been correctly advised is limited. The plaintiff's pleaded figure was £430,000 but in his closing speech Mr Robinson recognised that there is scope for debate here and suggested that, on the basis of the opposing experts' evidence (to which we turn shortly) the costs of reinstating the café as nearly as possible on a like-for-like basis in March 2007 or thereabouts would have been somewhere in the range of £308,000 to £490,000 (to the nearest £1,000).

55. Because the café was so comprehensively destroyed and there proved to be no surviving as-built drawings or other reliable records of its previous state, retrospective attempts to arrive at the appropriate reinstatement cost were initially made more difficult by differences of view as to whether the actual floor area of the pre-fire building was 121 or 154 sq. m. although it appears to have become common ground later on that the lower figure was that of the original building and that the higher figure reflected the addition of an extension sometime after 1991. Precise detail about the internal fitting out and finish of the pre-fire building was also scanty, based as it largely was on a set of grainy photographic "snaps" obtained by Rossborough from the owners from whom the plaintiff bought the café.

56. There are one or two indications in contemporaneous documents of what the plaintiff's advisers had in mind as the likely reinstatement cost. In a letter from Godel Architects addressed to Mr Sweeney dated 11th June, 2007, – a matter of only weeks after the fire - confirming the terms of their brief for the design of a replacement building, reference is made to a "target construction value" of £250,000". In evidence, Mr Godel suggested that this figure was quickly overtaken because it became obvious that it was unrealistic. But it is notable that it is of the same order of magnitude as the figure of £237,135 used by Mr Sweeney's firm NSJ Chartered Surveyors for the projected cost of a "Rebuild to Replicate Previous Café" as at 31st December, 2007. Mr Robinson suggested that the latter was of marginal use to the Court as Mr Sweeney was not present to explain in greater detail the basis of this figure; but this is hardly a point for the plaintiff to take given that it was the obvious party to call Mr Sweeney as a witness. But it is true to say that in neither case is there much supporting detail (as to whether, for example, the total figure includes fixtures and fittings). And in the case of the NSJ Chartered Surveyors' figure it is evident that it was based on an internal floor area of 1,300 sq.ft. (121 sq.m.) which was too low.

57. The greater part of the evidence presented to the Court on this subject took the form of reports and live evidence from two independent experts of what the reinstatement cost as at March 2007 might have been: Mr Hamish Menzies of H.M. Menzies Ltd for the plaintiff and Mr John Allo of Tillyard Ltd for Rossborough, both experienced chartered quantity surveyors.

58. Mr Menzies' approach was to take as his starting point the budget estimate of £449,698 compiled by A.C.Mauger in January 2009 (see paragraph 14 above) and (a) to adjust it (largely downwards) for differences between the scheme on which that estimate was based and the pre-fire building, except to the extent that betterment (the higher specification of the former) was dictated by planning and bye-law requirements, (b) to add a round figure amount of £50,000 for fixtures and fittings, some £80,000 for professional fees and some £16,000 for asbestos removal, demolition and site clearance, and (c) to adjust downwards for the estimated increase in costs and Goods and Services Tax since 2007. Based on an assumed internal floor area of 154 sq.m. this resulted in a total of approximately £480,000 in his original report of 27th April, 2011.

59. Mr Allo's approach was very different. In a fairly brief report dated 28th April, 2011, he explained that he had used his professional judgment "interpolated from other projects" to arrive at a per-square-metre figure of £1,150 and had applied this to assumed internal floor areas of 121 and 154 sq.m. to produce reinstatement cost estimates of some £228,000 and £274,000 respectively. Accompanying notes indicated that these figures excluded among other things fittings and costs associated with up-grading to comply with current building regulations.

70. The exchange by the experts of their initial reports revealed a difference between them of some £206,000 on the basis of an assumed internal floor area of 154 sq.m. There then followed:-

(i) a Joint Statement dated 23rd September, 2011, which sought to pinpoint the principal elements of that overall difference;

(ii) from M Menzies, a further one-page set of figures dated 19th October, 2011, comparing a per-square-metre cost of £1,719 for construction of the basic building (as derived from his earlier report but excluding demolition, pumped drainage, external works, contingencies and professional fees) with equivalent figures of £1,782 and £1,802 derived from tables published by Jersey Mutual Insurance Society ("Jersey Mutual") and Insurance Corporation of the Channel Islands Limited respectively;

(iii) from Mr Allo, a set of photographs and construction rates of three recently completed projects with which Tillyard had been involved, namely an "aquaculture" facility (£745 per sq.m. adjusted to 2007), a standard quality residential development (£1,164) and a high quality residential development (£1,863); and

(iv) a Supplementary Joint Statement dated 27th October, 2011, tabulating and comparing the foregoing "building only" rates as well as a further figure of £1,929 produced by Mr Menzies on the basis of a two storey timber frame house, but without reaching any consensus as to which of these figures was most appropriate for present purposes.

71. In evaluating the overall effect of this material and the related oral evidence of the two experts, the following appears to us to be reasonably clear. On any view Mr Allo's estimate needs to be augmented by an amount of the order of £50,000 to allow for fixtures and fittings, and a further sum to reflect additional costs resulting from then-current planning and bye-law requirements, matters that Mr Allo himself more or less accepted in cross-examination. It also became evident, somewhat surprisingly, during his cross-examination that the impression given in Mr Allo's original report and in the September 2011 Joint Statement that his opinion as to the appropriate per-square-metre rate was informed by his experience of "other Jersey projects", was unintended and that there was no such direct connection in his thinking, leaving the basis of his suggested rate of £1,150 a little thin.

72. When it comes to forming a view on the competing suggestions as to the appropriate per-square-metre rate for "building only" costs in 2007, it is difficult to be confident that examples of rates derived from other individual projects (as cited by one expert or the other) are valid comparators, given the non-standard form and construction of the original building and it is tempting to give more weight to the general guide figures published by Jersey Mutual and Insurance Corporation (£1,782 and £1,802 adjusted to 2007) – figures which tend to add credibility to Mr Menzies' figure of £1,719. For the most part, we also find Mr Menzies' approach the more analytically persuasive of the two. But the number of potential variables and the retrospective nature of the exercise mean that there is substantial scope for legitimate differences of opinion. Given that the pre-fire building was on any view a fairly rudimentary affair, we cannot help feeling that somewhere along the line Mr Menzies' conclusions overstate to some extent what the cost of reinstatement would have been considered to be in March 2007, even though we accept that the need for a new pumped drainage system would probably have been readily evident at that time.

73. That, of course, is by no means the end of the matter, given that we are concerned to decide the level of buildings cover that Mr Ruellan would be likely to have asked for had he been properly advised by Rossborough, not what the actual cost of reinstatement would have been. The time and expense likely to have been involved make it unrealistic, in our view, to suppose that Mr Ruellan himself would have retained quantity surveyors to advise him as to the appropriate figure, let alone that any such retainer would have resulted in a detailed analysis of the kind conducted by Mr Menzies and Mr Allo - and Mr Robinson does not suggest that this would have happened. But the opinions of those experienced quantity surveyors have a part to play, if only because neither thinks that figure of £220,000 for which the building was actually insured was adequate to provide for the full cost of like-for-like reinstatement.

74. Mr Journeaux submits and we accept that the obvious person for Mr Ruellan or Mr Reynolds to have turned to for advice was Mr Sweeney. We also accept that he would have been the obvious person for the plaintiff to have called to give evidence, with the eye of a qualified surveyor, of the construction and finish of the pre-fire building (given that he had, according to Mr Reynolds, inspected, photographed and surveyed it prior to the plaintiff' purchase of the café) and to have explained in greater detail the basis of the "target construction value" of £250,000 used in Mr Godel's letter of 11th June, 2007, (a figure which Mr Godel said was supplied by Mr Sweeney) and the figure of £237,135 contained in the NSJ Chartered Surveyors' schedule of costs to which we have made reference earlier. As it was, we did not hear from Mr Sweeney, no clear explanation for this absence was offered, and we are therefore left to make what we can of the estimates recorded in these two documents. As his figure of £237,135 was, as previously noted, based on an incorrect internal floor area - thus understating projected building costs by some £42,500 - it might be argued that it should be taken that Mr Sweeney would have made the same mistake had he been asked to advise Mr Ruellan in March 2007. But it would be perverse, in our view, to do anything other than assume that the advice that Mr Ruellan would have received, had he sought it, would have been sound. In any event, it is by no means clear that the Sweeney figures made allowance for fixtures and fittings.

75. On the other hand, having seen Mr Ruellan in the witness box, we doubt that he would have been

temperamentally inclined to insure the café premises for more than, at the very most, 150% of what had been paid for the entirety of the business – in other words £330,000 (on the basis of a supposed purchase price of £220,000): particularly in circumstances where, it seems, it was intended after a few months to carry out a major refurbishment of the café.

76. It would be artificial to pretend that it is possible to arrive at a final figure by any precise and logical process of calculation. Doing the best that we can, we think the probability is that had Mr Ruellan been appropriately advised by Rossborough he would have ended up insuring the buildings for £315,000 (that is, £95,000 more than the level of cover that the policy actually provided).

Business interruption: the period of the indemnity

77. The AXA policy included cover for business interruption for a period of twelve months. The plaintiff claims that this was inadequate, that Rossborough failed to discuss the matter with Mr Ruellan and that had they done so a period of three, or at least two, years would have been selected. Quite how the period of twelve months came to be chosen in the first place was never entirely clear but probably as a result of a default setting in the computerised AXA quotation programme. What is clear - as asserted by the plaintiff and conceded by Rossborough - is that the subject was never discussed with Mr Ruellan. Rossborough invites the Court to find that the plaintiff would not have been interested in such cover as they were planning to close the café within a matter of months for a major refurbishment and possibly even to rebuild the premises; but, while there may well have been discussion of some kind along these lines, it was not as far as we can see sufficiently definite to have eliminated all interest in the normal protection offered by business interruption cover.

78. Rossborough also argue that the twelve month period was clearly stated in the quotation documentation and that it was for M. Ruellan to speak up if he wanted a longer period. But both experts, Mr Wood and Mr Hammond, considered that it was incumbent on the broker to take the initiative and ensure that the matter was specifically considered with the client; and Mr Lee-Briard accepted in cross-examination that he should have discussed it with Mr Ruellan. As to what period would have been settled on had there been such a discussion, Mr Lee-Briard, having initially defended twelve months as part of a "standard package" for small businesses, eventually conceded in cross-examination by Mr Robinson that such a period was too short in the present case; Mr Hammond considered that it would have been "risky" to have taken a "set" period of twelve months and said he "would have been looking for more"; and Mr Wood said that in his experience twelve months had for some time been recognised (in the industry) as inadequate and that he would have considered two years to have been the appropriate period in the present case. On the other hand, the plaintiff' case for a three year period is not in our view made out. Neither Mr Ruellan nor Mr Reynolds said that they would have insisted on this; and Mr Wood evidently felt unable to go that far.

79. We accordingly conclude that the plaintiff succeeds on this element of their claim to the extent that they have established that, had Rossborough acted with due diligence, the probability is that the AXA policy would have included Business Interruption cover for a period of two years rather than one. The result is that the plaintiff's recovery under the policy actually effected would have been £95,000 less than it should have been (the parties having previously agreed that figure as the plaintiff's net annual loss of profit for the purposes of the litigation).

Continuing loss of profit

80. The final element of the plaintiff's damages claim is for (alleged) continuing loss of profit beyond the period of cover of their Business Interruption claim: in other words for loss at an annual rate of £95,000 per annum since March 2009 (on the basis of our foregoing conclusion on that part of the plaintiff's case). The fact that the café has still not been rebuilt is, they contend, a direct and foreseeable consequence of the ineffectiveness and inadequacy of the AXA policy and Rossborough's refusal to compensate them. It was, it was said, unrealistic to expect re-building to start while the litigation remained unresolved.

81. Whether a claim of this kind is sustainable in law – as submitted by Mr Robinson but disputed by Mr Journeaux – is unnecessary for us to decide, because the claim fails in any event, on its facts, for want of a causative link between the ineffectiveness of the AXA policy (and Rossborough's continued defence of the litigation) and the fact that the café remains in a derelict state.

82. In the first place, the plaintiff made little attempt to put forward any rigorous analysis or persuasive evidence as to when work could have started had AXA not repudiated liability, when the re-constructed premises would have been ready to start trading again, or how long it would have taken to build up business to pre-fire levels, having regard to what is known about the actual dates on which Planning Permission was granted (1st February, 2008), Building Bye Law Consent was granted (19th November, 2008), Mauger's estimate of the costs of construction to the Godel design and the fact that the likely construction period would have been five to six months. Mr Reynolds - who from August 2008 onwards became the sole shareholder in the plaintiff, having bought out Mr Laverick's share failed to address these key factors in any detail in his own evidence; Mr Laverick, with whom there seems to have been a falling out of some kind, was not called to speak to the prospects for the site at the time when he sold out to Mr Reynolds; nor, as already noted, did Mr Sweeney give evidence despite having remained involved in the project at least up to late 2010; and Mr Godel told the Court that he himself was not involved with the post-planning phase of the project and that the member of his firm who had been responsible for it had since left.

83. In the second place, it is plain that progress was also crucially dependent on another factor: the outcome of

negotiations between Mr Reynolds and the States of Jersey Treasury and Resources Department over the grant of a new lease of the café site on expiry of the old one in December 2012. Without such a lease or the outright sale of the site to the plaintiff, there would be little point in re-building the café. According to a letter from the Treasury and Resources Department dated 14th June, 2010, heads of agreement for a new 25 year lease had by then been agreed, a draft lease was under discussion between the Law Officers' Department and the plaintiff's own lawyer, and the Department was prepared to progress the lease "if your client is due to commence building a replacement café". But how exactly subsequent discussions proceeded was left unexplained. There was nothing in writing (either then or at any earlier stage) to suggest that progress was being impeded because of the failure of the AXA policy to pay out. And in the course of Mr Reynolds' cross-examination by Mr Journeaux he conceded, if reluctantly, that the real obstacle to re-building was the extended negotiations with the States over the new proposed lease and not any lack of funds.

Contributory negligence

34. Rossborough's fall-back contention is that, if it is held to have been in breach of contract, responsibility for the resulting loss should in any event be apportioned between the plaintiff as to 75% and Rossborough as to 25%, having regard to what it alleges was Mr Ruellan's own negligence in failing to read the documents that he received more carefully than he did and in failing to give more careful consideration to the appropriate figures to be included for buildings and business interruption cover. The statutory basis for such an apportionment is contained in Art. 4(1) of the Law Reform (Miscellaneous Provisions) Act 1960, which provides:-

> ***"Where any person suffers damage as the result partly of the person's own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."***

35. Responding, Mr Robinson argues that the present case falls squarely within the principle enunciated by Atkin J. in Dickson & Co-v-Devitt (1916) 86 LJKB 315 at 317-318 in rejecting the broker's argument that responsibility for the loss was that of the insured for failing to read the relevant insurance documentation:-

> ***"It appears to me, however, that the question is whether or not the loss which the claimants have sustained is a reasonable and natural consequence of the defendant's breach of contract. In my opinion, when a broker is employed to effect an insurance, especially when the broker employed is a person of repute and experience, the client is entitled to rely upon the broker carrying out his instructions, and is not bound to examine the documents drawn up in performance of those instructions to see whether his instructions have, in fact, been carried out by the broker. In many cases the principal would not understand the matter, and would not know whether the document did in fact carry out his instructions. Business could not be carried on if, when a person has been employed to use skill and care with regard to a matter, the employer is bound to use his own care and skill to see whether the person employed had done what he was employed to do. I think the principal is entitled to rely upon the reputation of the person employed."***

36. A similar line of thinking was voiced much more recently by Moore-Bick J, in Bollom-v-Byas Mosley [1999] Lloyd's LR 598 at 614:-

> ***"When a person engages a professional man to provide specialist services the law will not ordinarily impose a duty on that person to take steps to protect himself against negligence on the part of someone who has himself undertaken to act with reasonable skill and care. Negligence involves a failure to guard against a risk that is reasonably foreseeable and there cannot therefore be contributory negligence in a case of this kind unless the plaintiff ought reasonably to have foreseen that his adviser might fail to carry out his responsibilities."***

He continued:-

> ***"These propositions are well supported by authority and were not in dispute. In Barclays Bank Plc-v-Fairclough Building Ltd [1995] QB 241 Beldam LJ, with whom both Nourse and Simon Brown LJJ agreed, having considered Ellerman Lines Ltd-v-Electric Railway Co Ltd [1951] AC 601 summarised the position as follows at page 226G:-***

> ***"...contributory negligence does not necessarily involve breach of a duty of care owed to another party but it does consist of breach of an obligation imposed on a party by law, a breach which can be relied upon by a defendant for his advantage in reducing his own liability. To be regarded as negligent in law, conduct must involve a failure to guard against a risk which is reasonably foreseeable. If the conduct relied on consists of an omission to guard against the failure of another person to carry out his legal obligations, it must be established that experience shows such failure to be likely. Further, to be negligent the conduct must be unreasonable in all the circumstances. Generally speaking, a person could be said to have acted prudently in his own as well as in others' interests if to carry out skilled work he contracts with a reputable and experienced contractor of whose work and reputation he is aware. The nature of the contract and its terms are circumstances which must significantly affect not only the question whether the law should impose an obligation on the contracting party to act prudently in his own interest but also the nature and extent of any such obligation."***

37. Mr Journeaux, for his part submitted that other authorities suggest that there is no hard and fast rule that a plea of contributory negligence is not available as a partial defence in cases where the defendant's duty is to protect the claimant against the very damage that has occurred: Astley-v-Austrust Limited [1996] HCA 6 (1961) 161 ALR 155; Sahib Foods-v-Paskin Kyriakes Sands [2003] EWCA Civ 1832; and Synergy Health (UK) Ltd-v-CGU Insurance Plc [2010] EWHC 2583 (Comm.). He relied in particular on the High Court of Australia in Astley and the following passage from the judgment of Gleeson CJ (speaking on behalf of the majority), a passage with which the Court of Appeal in England expressed agreement in Sahib Foods:-

> ***"30. A finding of contributory negligence turns on a factual investigation of whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be reasonable for the plaintiff to rely on the defendant to perform its duty. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty may exculpate the plaintiff from a claim of contributory negligence; in other cases the nature of the duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty of the defendant, although relevant, is only one of the many factors that must be weighed in determining whether the plaintiff has so conducted itself that it failed to take reasonable care for the safety of its person or property."***

38. The English authorities are, therefore, not entirely at one in their approach. It may be that there is no "absolute rule" barring a plea of contributory negligence in circumstances of the kind under discussion. But, unfortunately, neither Dickson-v-Devitt nor Barclays Bank-v-Fairclough appears to have been cited to the Court of Appeal in Sahib Foods. If nothing else, it is difficult to imagine that the Court of Appeal in that case would have ignored the observations of a judge of the eminence of Atkin J. (in Dickson-v-Devitt) had they been drawn to its attention: the likelihood being that had that happened the Court would have wanted to qualify its own observations at least to the extent of acknowledging Atkin J.'s approach as the appropriate starting point in the case of an insurance broker - a presumption, one might say, the displacement of which requires cogent evidence of some kind. Such an approach would be in keeping with what Devlin J. spoke of as "the ordinary principle" in Compania Naviera Maropan-v-Bowaters Lloyd Pulp and Paper Mills Ltd [1955] 2 QB 68,77:-

> ***"Indeed, I think business, whether maritime or otherwise, might be gravely impeded if the ordinary principle were not allowed to operate freely – and by ordinary principle I mean that, generally speaking, a man is entitled to act in the faith that the other party to a contract is carrying out his part of it properly. It does not lie in the mouth of the promisor to say that the promisee has no right to assume that a promise has been faithfully carried out and should make his own inquiries to see whether it is or not. If everything done under contract has to be scrutinised and tested by the other party before he can safely act upon it, many transactions might be seriously held up....."***

The facts of that case (a shipping dispute about liability for damage to a vessel) were, it is true, very different from the present one, as indeed they were in Reardon Smith Line-v-Australian Wheat Board [1956] AC 266 (another shipping case) in which Devlin J.'s words were expressly approved in the Privy Council. So too was Barclays Bank-v-Fairclough (a building contract dispute) in which Beldam LJ (at 229) cited the same passage, prefaced by the words "That a contracting party is entitled to rely on the other party to a contract to carry out

his undertaking and to act carefully in doing so was emphasised by Devlin J……." And it is also true that of these cases only the last involved consideration of the Law Reform (Contributory Negligence) Act 1945. But the generality of the principle as expressed by Devlin J. appears to us to transcend the particular circumstances in which it arose on that occasion: the Court of Appeal in Barclays Bank-v-Fairclough plainly thought so and we respectfully agree.

39. But, however one approaches the matter, the circumstances of the present case, as we have found them to be, do not begin to justify the conclusion that Mr Ruellan was under an obligation to guard against negligence on the part of Rossborough. To suggest that such negligence on the part of a reputable broker was foreseeable would be absurd, as would the suggestion that Mr Ruellan's failure to guard against it was unreasonable. We see no justification for applying any discount to the damages to which the plaintiff is entitled.

Rossborough's Terms of Business

40. Rossborough also contends that clause 10.3 of its standard Terms of Business exonerates it, as a matter of contract, from any liability to the plaintiff of the kind claimed. That clause provided "[Rossborough] will not accept any liability whatsoever arising from a client's failure to read and fully understand the contents of insurance policies and other correspondence". However, at the time with which we are concerned, while these terms were printed on the back of every letter and invoice issued by Rossborough, it was not Rossborough's practice to include any reference to them on the front of its documents (a practice which, it transpired during the trial, has now changed); in none of the material correspondence in the present case was Mr Ruellan's attention drawn to their existence, nor was there any evidence that he was in fact aware of them; in any event, the pallid colouring and small print-size of the terms made them less than easy to read.

41. These uncontested facts allow this particular argument to be disposed of shortly. In Jersey, as in England, it is trite law that a legally binding contract is at heart a matter of mutual consent, the terms of which are determined, as a matter of evidence, by reference to what the parties must be presumed by their conduct to have agreed. The notion that standard terms and conditions of the kind described above can properly be treated as having been the subject of such consent so as to become binding on A simply because they appear on the reverse of correspondence emanating from B is, on any view, long-outmoded (if it was ever tenable, which is doubtful). Moreover, to attempt to exclude liability in this way at the time in question, before Rossborough's practice changed, was - Mr Lee-Briard conceded "in hindsight" - hardly compatible with a broker's obligation to treat clients fairly.

42. We pause at this point to add this. As the most senior member of the team who had dealings with Mr Ruellan and also a director of Rossborough, Mr Lee-Briard found himself in the unenviable position of repeatedly being required to try to defend the indefensible but, when faced with the persistent (though always courteous) cross-examination of Mr Robinson, having again and again to concede that things were not as they should have been on Rossborough's part. This he did, throughout, with a quiet and commendable dignity.

Challenges to the plaintiff's right to sue

43. Finally (although Mr Journeaux put these submissions in the forefront of his client's case), Rossborough challenges the plaintiff's right to sue on a number of interrelated grounds turning on the fact that the AXA policy was effected in the name of "Michael Ruellan t/a Café de Lecq" rather than Café de Lecq Limited and the fact that at the time when the policy took effect on 15th March, 2007, Mr Ruellan and Mr Reynolds had not yet acquired Café de Lecq Limited or been appointed directors.

44. It is convenient to take first of all the suggestion made by Rossborough that the fact that Mr Ruellan insured Café de Lecq in his own name "trading as Café de Lecq" was "not inadvertent", to use the phrase employed in Mr Journeaux's opening skeleton argument. The basis for the suggestion is said to be, first, the fact that Mr Ruellan had previously insured the Breakwater Café in the same way – "M. M. Ruellan trading as Breakwater Café" – when it was in fact owned by Arthurs Yard Limited and, secondly, that in his letter of 10th July, 2007, Mr Ruellan had explained that he had acted as he did in the case of Café de Lecq because he was the "manager of the trading risk" while Mr Reynolds was only "a silent partner." But beyond this, and one or two veiled hints by Mr Lee-Briard in the course of his evidence, the imputation of bad faith of some kind on the part of Mr Ruellan was never followed up and no specific motive for behaving in this way was ever suggested, much less established.

45. The more probable explanation for the way in which Mr Ruellan handled the matter is that he was not someone with a very clear appreciation of the concept of insurable interest and the need for precision in such matters. And in his letter of 10th July, 2007, he was almost certainly doing no more than trying to explain, somewhat clumsily, the reason why it was he alone who had given instructions to Rossborough – namely, that he was the active partner responsible for managing the café business and the person, accordingly, whose job it was to effect the requisite insurance. In any event, as we have already noted at an earlier stage, it seems to have been a matter of indifference to AXA that Café de Lecq Limited was not named as the insured; and when, following the Café de Lecq fire, new brokers who had been retained to deal with the Breakwater Café insurance in future had informed ICCI of the fact that the insurance should have been placed in the name of Arthurs Yard, there was no increase in premium or adverse comment. The suggestion that there was in this respect some deliberate non-disclosure or obfuscation by Mr Ruellan of the true state of affairs as regards the Café de Lecq is certainly unproven and probably nothing more than fantasy. The truth of the matter is that Rossborough did little or nothing to probe the matter of who or what entity should be named as the insured. Mr Lee-Briard did not

explain the concept of insurable interest. Nowhere did the statement of fact ask the crucial question "Are you/who is the legal owner of the *property* to be insured?"

96. This point apart, Rossborough's argument is two-fold. First, it is said that M. Ruellan was Rossborough's client and it was to him alone, not the plaintiff, that a duty of care was owed. Secondly, it is said that because M. Ruellan himself suffered no loss as a result of AXA's repudiation of liability (Café de Lecq Limited being the owner of the property destroyed) he had nothing of value to pass on to the plaintiff company pursuant to the assignment made on 25th February, 2010. As the plaintiff points out, the combined effect of these two contentions, if correct, is that although there was only one legal person at risk of loss (Café de Lecq Limited), no duty of care was owed by Rossborough to that person: a disturbing conclusion that suggests that something is amiss somewhere.

97. The answer to this seeming paradox, Mr Robinson submits, is that on a proper analysis Mr Ruellan was, quite plainly, acting as agent for the plaintiff company; and the fact that the plaintiff may at that point have been unknown to Rossborough (an undisclosed principal) does not affect the plaintiff's ability to contract and to sue on that contract.

98. Only one Jersey case expressly adopting the English rule concerning undisclosed principals was cited to us: McGorrin-v-Pascoe Unreported Judgment, 17th July, 1989. But that is no reason to doubt its validity in this jurisdiction. The law on this subject was summarised by Lord Lloyd of Berwick in the Privy Council case of Siu-v-Eastern Insurance Co Ltd [1994] 2 AC 199 at 207 as follows:-

> ***"(1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself or the circumstances surrounding the contract, may show that the agent is the true and only principal."***

99. A person may enter into a legally binding contract either through an agent whom he/she has actually authorised to enter into the contract on his/her behalf or whom he/she has led the other party to believe has been so authorised even if that is not in fact so: in the first case the agent is said to have "actual" authority and in the latter case "ostensible" authority. We are concerned here with the former, as was the Privy Council in Siu Kwan – hence the use of the term "actual authority" in the first of Lord Lloyd's five requirements. For present purposes, it is also important to bear in mind that "actual" authority may be conferred on an agent expressly or may be implied from the relationship between principal and agent and the prevailing circumstances.

100. Applying these principles first to the relationship between Mr Ruellan and AXA (and later to that between Mr Ruellan and Rossborough), Mr Journeaux points not only to the absence of evidence of any authority having been expressly conferred on Mr Ruellan to arrange insurance on behalf of the plaintiff, but to the fact that at the time of Mr Ruellan's dealings with Rossborough between 27th February and 15th March, 2007, he was not even a director or shareholder of that company – that not having happened until 2nd April when the sale and purchase of the plaintiff was formally completed. But this is to overlook the compelling grounds that exist for saying, as Mr Robinson does, that Mr Ruellan must have had *implied* authority to act as he did. Consider the position on 15th March, 2007, the day that the AXA policy arranged by Rossborough incepted. The terms of sale of the company had been agreed with Mr & Mrs Ropert; Mr Ruellan and Mr Reynolds had been allowed to take possession of the premises that day and start trading before completion of the sale had taken place; the bulk of the purchase price remained outstanding; the following day Mr Ropert was to cancel the existing insurance on the premises.(A "sad irony", as Mr Robinson put it, being that the cancelled Norwich Union policy did not contain any requirement for the deep fat fryer to be fitted with an automatic cut-out). In these circumstances, had the notional "officious bystander" asked the question of Mr and Mrs Ropert, as directors and shareholders of the plaintiff company, whether it would be in order for Mr Ruellan to take over responsibility for insuring the premises from that point, there can be little doubt surely that the answer would have been not just "Of course" but "Most certainly; we would expect you to do that".

101. Similarly, can there really be any doubt that Mr Ruellan was impliedly authorised by Mr Reynolds and Mrs Ruellan (as the other prospective shareholders in the plaintiff) to arrange insurance of the premises from the moment that the purchasers assumed occupation or that the intention of all concerned, including Mr Ruellan, was that the insurance should be for the benefit of the legal entity that would suffer loss in the event of fire or other incident causing damage to the premises? To suppose that Mr Ruellan's intention was merely to insure his own interest in the venture would be wholly unrealistic. As we have said previously, we read his letter of 10th July, 2007, as doing no more than endeavouring to explain, somewhat clumsily, the reason why it was he alone who gave instructions to Rossborough – namely that he was the active partner responsible for managing the business.

102. For these reasons, it appears to us that, as regards the AXA contract of insurance, the first and second of Lord

Lloyd's five requirements are satisfied. The third and fourth do not arise.

103. As regards the fifth, Lord Lloyd cited with approval the following passage from the judgment of Diplock L.J. in Tehran-Europe Co Lt-v-ST Belton (Tractors) Ltd [1968] 2 QB 545 at 555:-

> ***"Where an agent has such authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract. In the case of an ordinary commercial contract such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness of there are other circumstances which should lead the agent to realise that the other party was not so willing."***

Siu-v-Eastern Insurance was a case involving a claim by an undisclosed principal on an employer's indemnity policy, which had failed at first instance and in the Court of Appeal of Hong Kong. Allowing the appeal, the Privy Council based its decision in part on a finding of fact by the trial judge that the actual identity of the employer was a matter of indifference to the insurers, and in part on the ground – of importance for present purposes - that a contract of indemnity is an ordinary commercial contract: not one that requires to be classified as "personal" to the immediate parties to it so to the exclusion of any undisclosed principal.

104. In Talbot Underwriting Ltd-v-Nausch, Murray & Hogan Inc [2006] EWCA Civ 889 Moore-Bick LJ (with whom Waller LJ and Richards LJ agreed) put the matter as follows:-

> ***"The mere identification, whether by name or description, of certain persons as assureds cannot be sufficient of itself to demonstrate an unwillingness on the part of the insurer to contract with any other person. If it were otherwise, the principles under discussion would have no application at all to contracts of insurance. Each case must therefore be decided by reference to the terms of the contract under consideration and the circumstances in which it came to be made, though no doubt due regard should be had to the warning of Lord Lloyd in Siu Yin Kwan-v-Eastern Insurance Co Ltd that if the courts are too ready to construe written contracts as contradicting the right of an undisclosed principal to intervene it would go far to destroy the beneficial assumption in commercial cases to which Diplock L.J. referred in Teheran-Europe Co Ltd-v-S. T. Belton (Tractors) Ltd" (para. 27); and***

> ***"Whether any particular circumstance is or is not material is a question of fact which the court is usually invited to determine after hearing evidence from those who have practical experience as underwriters. It is not a question which can be determined on the basis of the agreed facts. I can understand that in many cases the identity of the undisclosed principal will be a matter of indifference to the insurer....." (para. 41).***

105. In our view, there is nothing about the contract with AXA sufficiently compelling to justify the conclusion that they would have been unwilling, in Diplock L.J.'s words, "to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract", or to warrant construing the contract "as contradicting the right of an undisclosed principal to intervene" (to heed the warning of Lord Lloyd in Sui-v-Eastern Insurance, as noted by the Court of Appeal in Talbot Underwriting). Certainly not where that (undisclosed) person was as closely associated with Mr Ruellan as the plaintiff was, and where the plaintiff was the party whose property was at risk. On the contrary, as mentioned earlier, it is unlikely that the precise identity of the insured would have been a matter of concern to AXA in this case.

106. Mr Ruellan was, of course, still bound to make disclosure of all circumstances concerning the plaintiffs that might have had a material bearing on the risk to be underwritten:-

> ***"The fact that the law generally recognises the right of an undisclosed principal to sue and be sued on a contract does not relieve the nominal insured from the duty to make full disclosure of all material circumstances in each case, including any which may relate to his undisclosed principal. That is essential to ensure a fair presentation of the risk to the insurer": per Moore-Bick LJ in Talbot Underwriting (para. 43)***

But we heard no evidence of anything that would warrant a finding of any material non-disclosure by Mr Ruellan.

107. We conclude, therefore, that as between Mr Ruellan and AXA, the former is in reality to be regarded as having been acting on behalf of the plaintiff as an undisclosed principal, with the result that the plaintiff would have been entitled, if necessary, to sue on the AXA policy in its own name. The next question is whether the contract between Mr Ruellan and Rossborough falls to be viewed in the same way. Mr Journeaux says not; that there is a fundamental difference between the sort of ordinary commercial contract with which the Privy Council was concerned in Siu-v-Eastern Insurance; that "it is important to a relationship such as that of broker and client that the broker knows who his client is for a number of reasons, including in order to enable him properly to perform the duties he agreed to perform which may also include fiduciary duties" (as it was put in Mr Journeaux's written closing submissions).

108. But no authority for this proposition, so far as the law of contract is concerned, was cited and the basis for the argument remained little more than assertion. It is also difficult to see what logical basis there could be for such a principle when an insurance broker's sole function is to facilitate the placing of contracts of a kind that the law regards as normal commercial transactions; when an experienced broker would know the rudiments of the law of agency and rules relating to undisclosed principals in relation to insurance and be alive to the possibility that a prospective "client" could be the agent of an undisclosed principal as in Sui-v-Eastern Insurance; and when, as here, the broker is to some extent acting as agent for the insurer in generating the quotation and other insurance documentation without reference to the insurer. There is nothing in Rossborough's dealings with Mr Ruellan that would warrant the conclusion that Rossborough regarded such dealings as personal to Mr Ruellan to the exclusion of anyone else whose interests he might be representing. Nor did Mr Lee-Briard suggest that he would have done anything differently had he been told that the person on whose behalf the insurance cover was required was the plaintiff company rather than Mr Ruellan personally. It appears to us, therefore, that here too Mr Ruellan is properly to be regarded as the agent of the plaintiff with the result that the plaintiff is fully entitled to be regarded as party to the contract with Rossborough and to sue for breach of that contract.

109. If we are wrong in this analysis and conclusion the plaintiff's long-stop argument based on the Assignment by Mr Ruellan in February 2010 entitles them still to succeed. Rossborough says that that line of argument does not work, because Mr Ruellan himself suffered no loss, could not himself have claimed on the policy, and therefore had nothing of value to assign to the plaintiff. But this response is reminiscent in part of the defence run by insurers and rejected by the House of Lords in A. Tomlimson (Hauliers) Ltd-v-Hepbun [1966] AC 451. It was held there that road hauliers had an insurable interest in goods entrusted to their care and were entitled to recover not just their own loss but also value of goods consigned to them by customers for carriage (up to policy limits); as to the latter element, they were trustees for the owners of the proceeds of the insurance. The insured in that case was, of course, a bailee, which is not the case here. But the underlying principle is not confined to that class of insureds: see the judgment of Sumption QC (sitting as a deputy High Court judge) in Lonsdale & Thompson Ltd-v-Black Arrow Group [1993] Ch. 361, a case involving a claim on a policy by a landlord with only a limited interest in the premises insured:-

> ***"The authors of these judgments [concerning trustees and others] regarded them as turning on two critical factors. The first was that in each case the subject matter of the insurance was the whole interest in the property insured and not simply the assured's interest. That was treated as a question of construction: see, in particular, Lord Reid in Tomlinson [1966] A.C. 451, 469. It is usually enough that when construed on ordinary principles the policy covers the whole value of the subject matter and not only the value of some partial interest in it. The second factor was that so far as the assured was thereby enabled to recover in excess of the value of his own interest, it had to be shown that he would be accountable for that excess, either by virtue of his own distinct legal obligations to the holders of the other interests or by virtue of a trust which the courts were, at least in some cases, prepared to construct for the occasion."***

110. If, contrary to our earlier finding, Mr Ruellan is not to be treated as having acted as agent for the plaintiff, then the only other tenable construction of the facts - and of the AXA policy - was that Mr Ruellan, as the person with responsibility for actively running the business and looking after the café ("the Manager of the trading risk" as he put it in his letter of 10th July, 2007), intended to insure the full value of the premises for which he was responsible; that as between him and AXA the policy written was, as a matter of construction, one that was designed to provide cover for the full value of the café and not just for the value of Mr Ruellan's personal interest in the enterprise; that, to the extent that that full value exceeded any personal interest of his own, any recovery would plainly be held on trust for the owner and that, accordingly, Mr Ruellan was entitled, on destruction of the café, to recover up to the full values provided by the policy irrespective of the measure of his own personal interest, subject always to an obligation, as trustee, to account to the plaintiff for the proceeds. The same goes for any contractual rights that Mr Ruellan might have in relation to Rossborough. It follows, then, that with the assignment by Mr Ruellan of those rights to the plaintiff, the latter became legally possessed of all the necessary ingredients of an enforceable claim for damages against Rossborough: the right to assert breach of a contractual duty of care and the appropriate standing as the entity that had, as a result of that breach, suffered loss.

111. These conclusions make it unnecessary for us to explore the question whether Rossborough in any event owed a non-contractual duty of care to the plaintiff as well as a contractual duty to Mr Ruellan.

Conclusion

112. For these reasons we hold that the plaintiff's claim substantially succeeds and that Rossborough is liable in damages equivalent to the total amount that the plaintiff would have recovered under the AXA policy enhanced (i) as regards building cover, by an amount of £95,000 and (ii) as regards business interruption cover, by an amount of £95,000 for an additional period of 12 months; in other words:-

Buildings :	£315,000
Business Interruption:	£190,000
Contents:	£ 20,000
Stock:	£ 1,500
Freezer contents:	£ 2,000
TOTAL	£ 528,500

We will hear further submissions on the appropriate award of interest.

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